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 Counterclaim Defendant  
 APPLE INC.

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 (OAKLAND DIVISION)

APPLE INC.,

Plaintiff,

v.

PODFITNESS, INC., and DOES 1-100,  
 inclusive,

Defendants.

Case No. C 06-5805 SBA

**DECLARATION OF ANDREW M.  
 ABRAMS IN SUPPORT OF APPLE INC.'S  
 OPPOSITION TO DEFENDANT  
 PODFITNESS, INC.'S PARTIAL MOTION  
 FOR SUMMARY JUDGMENT**

Date: June 3, 2008  
 Time: 1:00 pm  
 Courtroom: 3, 3rd Floor  
 Judge: Hon. Sandra B. Armstrong

PODFITNESS, INC.,

Counterclaim Plaintiff

v.

APPLE INC.,

Counterclaim Defendant

I, Andrew M. Abrams, declare as follows:

1. I am an associate of Fish & Richardson P.C., counsel of record in this action for

1 Apple Inc. (“Apple”). I am a member of the Bar of the State of California and am admitted to  
2 this Court. I have personal knowledge of the matters stated in this declaration and would testify  
3 truthfully to them if called upon to do so.

4 2. A true and correct copy of excerpts from the transcript dated February 4, 2008 of  
5 Jeff Hays deposition is attached hereto as Exhibit 1.

6 3. A true and correct copy of a document produced by Defendant Podfitness, Inc.  
7 (“Defendant”) in discovery bearing document number PF000489 is attached hereto as Exhibit 2.

8 4. A true and correct copy of a document produced by Defendant in discovery  
9 bearing document number PF000518 is attached hereto as Exhibit 3.

10 5. A true and correct copy of a document produced by Defendant in discovery  
11 bearing document number PF000517 is attached hereto as Exhibit 4.

12 6. Defendant did not mention its “podcast” theory a single time during all of the  
13 correspondence between the parties from Defendant’s launch in April 2006 and the filing of the  
14 complaint in September 2006. On information and belief, the first mention of this theory was in  
15 connection with the mediation in April 2007.

16 7. A true and correct copy of an excerpt from The Cult of iPod (2005) by Leander  
17 Kahney is attached hereto as Exhibit 5.

18 8. The Podfitness service launched in April 2006 after Apple objected to  
19 Defendant’s infringement of Apple’s marks.

20 9. A true and correct copy of a document produced by Defendant in discovery  
21 bearing document number PF000705 is attached hereto as Exhibit 6.

22 10. A true and correct reproduction of the text of a “letter” from Jeff Hays to Steve  
23 Jobs posted online at *www.podfitness.com/steve* is attached hereto as Exhibit 7.

24 11. True and correct copies of documents produced by Defendant in discovery  
25 bearing document numbers PF002121, 2137, 442, and 446 are attached hereto as Exhibit 8.

26 12. A true and correct copy of a document produced by Defendant in discovery  
27 bearing document number PF002974 is attached hereto as Exhibit 9.

1           13.     A true and correct copy of a document produced by Defendant in discovery  
2 bearing document number PF000432 is attached hereto as Exhibit 10.

3           14.     A true and correct copy of a document produced by Defendant in discovery  
4 bearing document number PF001042 is attached hereto as Exhibit 11.

5           15.     A true and correct copy of a document produced by Defendant in discovery  
6 bearing document number PF000474 is attached hereto as Exhibit 12.

7           16.     A true and correct copy of a document produced by Defendant in discovery  
8 bearing document number PF002409 is attached hereto as Exhibit 13.

9           17.     A true and correct copy of a document produced by Defendant in discovery  
10 bearing document number PF000485 is attached hereto as Exhibit 14.

11          18.     A true and correct copy of a document produced by Defendant in discovery  
12 bearing document number PF001014 is attached hereto as Exhibit 15.

13          19.     True and correct copies of documents produced by Defendant in discovery  
14 bearing document numbers PF000043-44 are attached hereto as Exhibit 16.

15          20.     True and correct copies of documents produced by Defendant in discovery  
16 bearing document numbers PF009899, 11986, 22617, 22651 are attached hereto as Exhibit 17.

17          21.     True and correct copies of documents produced by Defendant in discovery  
18 bearing document numbers PF000648-49 are attached hereto as Exhibit 18

19          22.     A true and correct copy of a document produced by Defendant in discovery  
20 bearing document number PF001317 is attached hereto as Exhibit 19.

21          23.     A true and correct copy of a document produced by Defendant in discovery  
22 bearing document number PF001087 is attached hereto as Exhibit 20.

23          24.     True and correct copies of printouts from the podfitness.com website are attached  
24 hereto as Exhibit 21.

25          25.     True and correct copies of documents produced by Defendant in discovery  
26 bearing document numbers PF002201, 2228, 2243 are attached hereto as Exhibit 22.

27          26.     A true and correct copy of a document produced by Defendant in discovery  
28 bearing document number PF005183 is attached hereto as Exhibit 23.

1           27.     A true and correct copy of a document produced by Defendant in discovery  
2 bearing document number PF000807 is attached hereto as Exhibit 24.

3           28.     A true and correct copy of a document produced by Defendant in discovery  
4 bearing document number PF001369 is attached hereto as Exhibit 25.

5           31.     Defendant has admitted that it obtained access to Apple's iTunes data by agreeing  
6 to the terms and conditions of the "iTunes COM for Windows SDK License Agreement." A true  
7 and correct copy of the iTunes COM for Windows SDK License Agreement is attached hereto as  
8 Exhibit 26.

9           32.     Defendant adopted a logo for its products and services, which has promoted on its  
10 website and which is identical to Apple's Shuffle Logo, the subject of U.S. Trademark  
11 Registration No. 3,067,950. A true and correct copy of a printout from the podfitness.com  
12 website showing use of the logo is attached hereto as Exhibit 27.

13           33.     Defendant also has used aspects of Apple's MADE FOR IPOD logo, the subject  
14 of U.S. Trademark Registration No. 3,341,286, to promote and sell its goods and services.

15           34.     A true and correct copy of an excerpt from a Fortune magazine article dated  
16 June 27, 2005 is attached hereto as Exhibit 28.

17           35.     A true and correct copy of an excerpt from The Perfect Thing: How the iPod  
18 Shuffles Commerce, Culture and Coolness by Steven Levy is attached hereto as Exhibit 29.

19           36.     A true and correct copy of a printout from the podfitness.com website dated  
20 September 26, 2006 is attached hereto as Exhibit 30.

21           37.     A true and correct copy of a printout from the podfitness.com website dated  
22 January 4, 2008 is attached hereto as Exhibit 31.

23           38.     A true and correct copy of a document produced by Defendant in discovery  
24 bearing document number PF001122 is attached hereto as Exhibit 32.

25           39.     True and correct copies of documents produced by Defendant in discovery  
26 bearing document numbers PF000979-988 are attached hereto as Exhibit 33.

27           40.     A true and correct copy of a document produced by Defendant in discovery  
28 bearing document number PF010056 is attached hereto as Exhibit 34.

1           41.     A true and correct copy of a printout from the website gadgetreview.com  
2 (<http://www.gadgetreview.com/2006/03/podfitnesscom-personal-trainer-service.html>) from  
3 March 2006 is attached hereto as Exhibit 35.

4           42.     A true and correct copy of a document produced by Defendant in discovery  
5 bearing document number Exhibit PF001996 is attached hereto as Exhibit 36.

6           43.     A true and correct copy of a document produced by Defendant in discovery  
7 bearing document number PF009471 is attached hereto as Exhibit 37.

8           44.     True and correct copies of documents produced by Defendant in discovery  
9 bearing document numbers PF009266, 9390, 9899, 10185, 10635, 10652, 22651 are attached  
10 hereto as Exhibit 38.

11          45.     True and correct copies of documents produced by Defendant in discovery  
12 bearing document numbers PF001867, PF001919, and PF002014-2016 are attached hereto as  
13 Exhibit 39.

14          46.     A true and correct copy of a document produced by Defendant in discovery  
15 bearing document number PF005167 is attached hereto as Exhibit 40.

16          47.     A true and correct copy of a document produced by Defendant in discovery  
17 bearing document number PF000943 is attached hereto as Exhibit 41.

18          48.     A true and correct copy of a document produced by Defendant in discovery  
19 bearing document number PF001854 is attached hereto as Exhibit 42.

20          49.     A true and correct copy of a document produced by Defendant in discovery  
21 bearing document number PF002034 is attached hereto as Exhibit 43.

22          50.     True and correct copies of documents produced by Defendant in discovery  
23 bearing document numbers PF024647-24648 are attached hereto as Exhibit 44.

24          51.     A true and correct copy of a printout from the thisnext.com website  
25 (<http://www.thisnext.com/item/EADCEDCE/Podfitness-Custom-Audio>) is attached hereto as  
26 Exhibit 45.

52. True and correct copies of documents produced by Defendant in discovery bearing document numbers PF001947; PF001976; PF001990; PF002058; PF002081 are attached hereto as Exhibit 46.

53. A true and correct copy of a document produced by Defendant in discovery bearing document number PF001978 is attached hereto as Exhibit 47.

54. True and correct copies of printouts from Internet publications and blogs referring to Apple's iPod player as a "Pod" are attached hereto as Exhibit 48.

55. A true and correct copy of a document produced by Defendant in discovery bearing document number PF001503 is attached hereto as Exhibit 49.

56. A true and correct copy of a document produced by Defendant in discovery bearing document number PF002271 is attached hereto as Exhibit 50.

57. A true and correct copy of a document produced by Defendant in discovery bearing document number PF002328 is attached hereto as Exhibit 51.

58. A true and correct copy of a document produced by Defendant in discovery bearing document number PF002048 is attached hereto as Exhibit 52.

59. Of an eight-page response to office action in 2002, Apple devoted only a single line to differences in appearance; otherwise, the entire brief consisted of arguments distinguishing the respective goods and consumers.

I declare under penalty of perjury under the laws of the United States of America  
that the foregoing is true and correct.

Executed this 28th day of April, 2008, at San Diego, California.

/s/ Andrew M. Abrams  
Andrew M. Abrams

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**PROOF OF SERVICE**

I am employed in the County of San Diego, my business address is Fish & Richardson P.C., 12390 El Camino Real, San Diego, CA 92130. I am over the age of 18 and not a party to the foregoing action.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for personal delivery, for mailing with United States Postal Service, for facsimile, and for overnight delivery by Federal Express, Express Mail, or other overnight service.

On April 28, 2008, I caused a copy of the following document(s):

**DECLARATION OF ANDREW M. ABRAMS IN SUPPORT OF APPLE INC.'S  
OPPOSITION TO DEFENDANT PODFITNESS, INC.'S PARTIAL MOTION FOR  
SUMMARY JUDGMENT**

James E. Magleby  
Jason A. McNeill  
Magleby & Greenwood, P.C.  
170 South Main Street, Suite 350  
Salt Lake City, UT 84101  
(801) 359-9011 (facsimile)

Attorneys for Defendant  
PODFITNESS, INC.

☒

**FEDERAL  
EXPRESS:**

Such correspondence was deposited on the same day in the ordinary course of business with a facility regularly maintained by Federal Express

James M. Wagstaffe  
Kerr & Wagstaffe LLP  
100 Spear Street, Suite 1800  
San Francisco, CA 94105-1528  
(415) 371-0500 (facsimile)

Attorneys for Defendant  
PODFITNESS, INC.

☒

**PERSONAL:**

Such envelope was delivered by hand to the offices of the addressee.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury that the above is true and correct. Executed on April 28, 2008, at San Diego, California.

/s/Nicole C. Pino

Nicole C. Pino